

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C., 20554

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In the Matter of )  
 ) MM Docket No. 93-48  
Policies and Rules Concerning )  
Children's Television Programming )  
 )  
Revision of Programming Policies )  
for Television Broadcast Stations )

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REPLY COMMENTS OF

CENTER FOR MEDIA EDUCATION, PEGGY CHARREN, AMERICAN ACADEMY  
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## SUMMARY

The Center for Media Education ("CME"), et al.,<sup>1</sup> strongly support the Federal Communications Commission's ("Commission" or "FCC") efforts to improve broadcaster compliance with the Children's Television Act of 1990 ("CTA"). We endorse the Commission's proposals to adopt a quantitative standard, clarify the vague definition of what constitutes educational programming, and improve the flow of information to the public about the educational programming available for children. CME et al. believe these changes are necessary because the record to date demonstrates that broadcasters have made little effort to provide educational programming for children.

Relying on the 1995 NAB Survey, the industry claims that broadcasters have responded favorably to the CTA by "significantly" increasing the amount of educational and informational children's programming. However, this survey is highly unreliable. There is no way to confirm that broadcasters counted only programs that comport with the FCC's definition because NAB failed to provide the names and descriptions of programming broadcasters claimed as educational. In addition,

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<sup>1</sup> Descriptions of Commenters may be found in Commenters original filing at Appendix C. The American Psychological Association ("APA") has joined these reply comments. The APA is the largest organization representing psychologists in the world. The broad mission of the APA is to advance psychology as a science, a profession, and as a means of promoting human welfare. Members of the APA work as researchers, practitioners, teachers, administrators, and in many other professional capacities. The APA strives to utilize the science of psychology to address important public concerns, including issues such as children's television.

the survey's results are likely biased because only those broadcasters with good programming records had the incentive to return the survey. And the survey uses a definition of educational and informational programming for children that is inconsistent with the CTA itself, and probably resulted in inflated results

In contrast, a study prepared by Dale Kunkel, Ph.D., Professor of Communications at the University of California, Santa Barbara, found that the amount of programming aired by broadcasters in 1994 had not increased since 1993. Because the industry has not submitted credible evidence of sustained compliance with the CTA, the Commission can and should adopt a quantitative standard, a strengthened definition of core programming, and improved measures to aid monitoring of broadcasters programming efforts.

A close examination of the legislative history of the CTA shows that Congress did not preclude the adoption of quantitative standards or a strengthened definition of educational programming. Indeed, the legislative history shows that there was support for such measures, especially where, as here, voluntary efforts have not produced substantial increases in the availability of children's educational programming. The FCC's proposals also are consistent with the First Amendment. Broadcast jurisprudence, unlike traditional First Amendment jurisprudence, permits the imposition of affirmative requirements on broadcasters. The FCC's proposals comport with the First

Amendment because they are narrowly tailored to meet the government's substantial interest in increasing educational programming for children.

For a guideline to be effective, the Commission should clarify the definition of "core programming." Specifically, the FCC must clarify that only programs that are specifically designed to educate and inform children, and not those programs that are purely pro-social, should be counted toward a licensee's compliance with the Act. The Commission should also specify that only programs airing after 7 a.m. count toward the core programming requirement. Furthermore, the Commission should adopt a specific reporting form and other measures that will improve the public's ability to effectively communicate with broadcasters about children's programming.

Contrary to the claims of some commenters, the existence of cable, VCRs, and the Internet has not reduced in any way the need for educational programming on commercial broadcast stations. Broadcasters, who receive free access to the airwaves, have an obligation to serve the public interest and provide this programming to children. Moreover, many of these services are not available to a significant number of children because of lack of access, funds, or skills.

Adoption of the Commission's proposals will increase broadcaster compliance with the CTA and facilitate Commission review of licensee's performance at renewal time. The record in this proceeding shows that increases in children's educational

programming only occur when there is official pressure, and that decreases occur when the pressure is off. The Commission now has the opportunity to stop this cycle. We urge the Commission to adopt these proposals and implement clear, strong rules that will generate regular educational programming for children from each broadcast licensee.

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**REPLY COMMENTS OF  
CENTER FOR MEDIA EDUCATION, ET AL.**

**INTRODUCTION**

The record in this proceeding conclusively demonstrates that reliance on the voluntary efforts of broadcasters will not result in sustained increases in the availability of educational and informational programming for children on commercial broadcast stations. The only way to bolster broadcaster efforts is through timely and precise action by the Federal Communications Commission ("FCC" or "Commission"). Broadcasters need specific guidance from the Commission on how to discharge their responsibilities under the Children's Television Act ("CTA"). Therefore, these Commenters believe that the FCC should adopt a specific quantitative standard programming, a clarified definition of what constitutes educational programming, and enhanced monitoring measures.

**I. THE RECORD CONCLUSIVELY DEMONSTRATES THERE HAS NOT BEEN A SIGNIFICANT INCREASE IN EDUCATIONAL PROGRAMMING FOR CHILDREN**

No credible evidence has been submitted in this proceeding to demonstrate that there has been widespread, sustainable



increases in the quantity of children's educational programming on commercial broadcast stations. Although the Commission called upon commercial broadcasters to submit data on children's educational programs being offered, only one of the major networks submitted the requested information.<sup>2</sup> The other networks relied upon the NAB Survey ("1995 NAB Survey") to substantiate claims that broadcasters have been responding favorably to the CTA. The 1995 NAB Survey does not, however, offer dependable evidence of the amount of educational children's programming on commercial broadcast stations. The methodology of the 1995 Survey is suspect, and as a result, the conclusions it draws are questionable.

The NAB touts its 1995 NAB Survey as proof that on average, broadcast stations are airing over four hours of educational programming a week. However, in 1994, the NAB submitted a substantially similar survey ("1994 NAB Survey") that was heavily

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<sup>2</sup> See Fox Broadcasting Co. Ex Parte Presentation, MM Docket No. 93-48 (Oct. 26, 1995). CME et al. were encouraged by the amount of progress that Fox appeared to show in the area of children's educational programming. Fox alleges that its stations increased the amount of children's educational programming from virtually none to an average of four hours per week. CME et al. support the Commission's current efforts to seek the same type of comprehensive data on children's educational programming that Fox provided from the other networks. See Letters from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Ralph W. Gabbard, Chairman, CBS Television Network Affiliates Advisory Board, and Ken J. Elkins, Chairman, NBC Affiliates Association, Pulitzer Publishing Co., MM Docket No. 93-48 (Oct. 26, 1995).

criticized by the Commission and these Commenters.<sup>3</sup> The Commission and these Commenters pointed out the following problems in the 1994 NAB Survey: (1) face value reliance on broadcasters' conclusions that educational and informational programming had increased without reporting the program names and descriptions to substantiate their claims; (2) the non-representative nature of the sample which increased the potential for broadcaster bias; and (3) the overly broad definition of educational and informational programming used by the NAB. The 1995 NAB Survey does not adequately respond to the criticisms leveled against the 1994 NAB Survey, and as a result has the same problems. In a letter attached to these comments, Professor Nancy Signorielli, Ph.D, University of Delaware, has examined the 1995 Survey and stated that the study "remains conceptually and methodologically flawed."<sup>4</sup> Because the 1995 NAB Survey suffers the same infirmities as the 1994 NAB Survey, the Commission should not use it to determine whether or not broadcasters have

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<sup>3</sup> See Policies and Rules Concerning Children's Television Programming, Notice of Proposed Rule Making, MM Docket No. 93-48, 10 FCC Rcd. 6308 at ¶ 18 (Apr. 5, 1995) ("Notice"); Comments of CME et al., En Banc Reply Comments at 4-7 and Appendix, MM Docket No. 93-48 (1994) ("Reply Comments of CME et al.").

<sup>4</sup> Letter from Nancy Signorielli, Ph.D., Professor, University of Delaware, Department of Communication, to Kathryn Montgomery, Ph.D., President, Center for Media Education (Nov. 13, 1995) at Attachment A ("Signorielli Letter"). Specifically, Professor Signorielli finds fault with: (1) the lack of adequate guidelines and a suitable operationalization of the definition of educational programming; (2) the tendency for those in control to respond in a socially desirable way to "help document the industry's response"; and (3) the fact that more than half of the broadcast stations either did not reply or were not even contacted as part of the process.

responded affirmatively to the CTA.

**A. The Commission Should Reject the NAB Survey Because Broadcasters Failed to Identify and Describe Programs They Claim Fulfill the Children's Television Act**

The Commission stated that the 1994 NAB Survey lacked utility because it accepted at face value station claims about the educational content of their programming.<sup>5</sup> Because broadcasters claimed an overall increase in the average amount of children's educational programming aired each week without supplying the name of the program; a description; the time, date and day the program aired; and the length of the program, the Commission and the public were unable to evaluate whether an increase in educational and informational programming actually occurred.<sup>6</sup> In the Notice, the Commission stated that its own experience with face value claims made it call into question "the reliability of the results presented and the amount of programming on the air [broadcasters] would purport to document."<sup>7</sup> Moreover, even a cursory review of children's

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<sup>5</sup> Notice at ¶ 18; Signorielli Letter at 2-3.

<sup>6</sup> The FCC should quickly dispense with the NAB's argument that there is no need to provide programming information and that the FCC and the public should completely defer to the face value claims of broadcasters. The FCC has, in fact, already passed rules which impose children's educational program reporting requirements on all broadcasters. See 47 C.F.R. § 73.3526(a)(8)(iii). These rules require broadcasters "at a minimum" to include "the time, date, duration and a brief description of the program." Id. Given the past pattern of broadcasters to make questionable claims, until this information is submitted, the NAB survey is unverifiable, and thus, lacks any credibility.

<sup>7</sup> Notice at ¶ 18.

programming reports reveals that broadcasters have misidentified certain noneducational programs as contributing to their compliance under the CTA.<sup>8</sup>

From the Commission's statements in the Notice, it is clear that the Commission did not expect the NAB to submit another survey that did not provide the names and details of the programs being claimed as educational.<sup>9</sup> Yet that is exactly what the NAB did. The 1995 NAB Survey is just as useless as the 1994 NAB Survey because it does not provide the names or any information about the programs broadcasters are claiming. There is no way to give credence to the NAB's assertion about increases in educational programming because no one knows what programs are being included in their study.

Because the Commission has recognized the problems inherent in NAB's 1995 Survey, it is currently trying to obtain additional information about the 1995 NAB Survey.<sup>10</sup> CME et al. strongly

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<sup>8</sup> Notice at ¶ 18. Dr. Kunkel, a Professor of Communication at the University of California, Santa Barbara, and Ursula Goette reviewed the children's educational programming reports of a randomly selected number of stations. They found that broadcasters claimed shows such as "Mighty Morphin Power Rangers", "Yogi Bear", and "America's Funniest Home Videos" as educational programming for children. See Dale Kunkel, Ph.D., and Ursula Goette, Broadcasters' Response to the Children's Television Act (Oct. 12, 1995) ("Kunkel & Goette"); see also Dale Kunkel, Ph.D., and Julie Canepa, Broadcasters' License Renewal Claims Regarding Children's Educational Programming (1994).

<sup>9</sup> See Notice at ¶ 20.

<sup>10</sup> See Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Henry L. Bauman, Executive Vice President and General Counsel, National Association of Broadcasters, MM Docket No. 93-48 (Oct. 25, 1995). The FCC requested that the NAB supply a list, description, air date, and air time for each of the

support this effort. Moreover, Commenters specifically request that this information be made available for public comment once it is provided to the Commission.<sup>11</sup> However, until clear and convincing evidence of broadcaster improvements in children's educational programming is submitted to the Commission and subject to public comment and review, the Commission should not rely on the 1995 NAB Survey during its decisionmaking process.

**B. The Commission Should Reject the 1995 NAB Survey Because It Is Not Representative of Industry Efforts**

Another problem with the NAB Survey is that the responses are not likely to be representative of the broadcast industry's efforts. Even though the 1995 NAB Survey response rate was higher than the 1994 NAB Survey response rate, there was still a significant number of stations that failed to respond to, or did not receive, the 1995 NAB Survey.<sup>12</sup> At the time the NAB faxed its 1995 NAB Survey to broadcasters, there were almost twelve

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programs included in its survey calculations. In addition, the FCC requested from the NAB comparability data, information on how the NAB developed its list of known fax numbers, and details on how the NAB knew that the broadcasters who did not respond to the survey did not air significantly fewer hours of children's programming.

<sup>11</sup> See 47 C.F.R. 1.415(d).

<sup>12</sup> See Signorielli Letter at 3. Signorielli also disputes that the 1995 NAB Survey shows a positive rather than a negative non-response bias. She points out that by faxing the survey only to stations with working fax numbers, the NAB may have been omitting stations with fewer financial resources who have less to spend on educational and informational programming for children. She also states that the stations who did not respond to the 1994 NAB Survey but had responded to the 1995 NAB Survey may have thought they more leeway in specifying educational and informational programming. Id.

hundred commercial television stations.<sup>13</sup> The results in the 1995 NAB Survey are based on responses from only 559 stations who had "usable" questionnaires.<sup>14</sup> Thus, responses from less than half of all stations were considered in preparing NAB's analysis of "industry-wide practices". Given the low response rate, NAB's conclusions are speculative at best.

Moreover, there are strong reasons to question the representative nature of the responses NAB did receive. Broadcasters receiving the survey undoubtedly understood that high educational programming numbers would serve their interest by causing the Commission to second-guess the need for standards.<sup>15</sup> Conscious of this need to portray overall broadcast compliance with the Act as high, broadcast stations with poor records had no incentive to return the survey.<sup>16</sup> On the other hand, those with strong records had every reason to respond because they knew that a positive survey could make the

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<sup>13</sup> As of October 31, 1994, there were 1,158 commercial broadcast television stations. As of August 31, 1994, there were 1,157 commercial broadcast television stations.

<sup>14</sup> See 1995 NAB Survey at 3.

<sup>15</sup> See Signorielli Letter at 2-3 (stating that the wording of the survey "elicits socially desirable responses").

The Commission has stated that "if data were submitted that show that the educational and informational needs of children are being met consistent with the goals of the CTA, we would reassess the need for further action." Notice at ¶ 20.

<sup>16</sup> See Notice at ¶ 18. The Commission should consider that the NAB said it took "special efforts" to get broadcasters to respond to the survey. These Commenters wonder if those "efforts" made it more likely that broadcasters with good records responded, thus skewing the results even more.

broadcast industry look better and convince FCC Commissioners that further regulation was not currently necessary.<sup>17</sup>

**C. The Commission Should Reject the Survey Because the NAB Used an Overly Broad Definition of Educational and Informational Programming**

The 1995 NAB Survey asked stations to list all of their children's programming that met the following definition for educational and informational children's programming:

Programming originally produced and broadcast for an audience of children 16 years old and younger which serves their cognitive/intellectual or social/emotional needs.<sup>18</sup>

As Commenters previously pointed out, this definition is flawed because it leaves out the statutory requirement that programming be specifically designed to meet children's educational needs.<sup>19</sup>

NAB's definition permits broadcasters to count any programming produced for children that fulfills their "social or emotional needs." This vague definition allows broadcasters to overstate the number of educational programs because it lends itself to subjective interpretations and offers no guidance on qualifying educational and informational programming. Because this

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<sup>17</sup> Already one Commissioner has remarked that the 1995 NAB Survey may demonstrate increasing efforts by broadcasters to serve the educational and informational needs of children. See Commissioner Rachelle Chong, Remarks to Women in Cable and Telecommunications, "Women Being Heard and in Command: Making it Happen" at 7-8 (Oct. 30, 1995). However, Commenters urge the Commission not to be swayed by industry rhetoric because once a close examination of the 1995 NAB Survey is conducted, the Commission will see that the Survey is incomplete and does not answer the real question of broadcaster compliance with the CTA.

<sup>18</sup> See 1995 NAB Survey at 2.

<sup>19</sup> See Reply Comments of CME et al., 4-7 and Appendix.

definition may have caused broadcasters to include noneducational programming in their surveys, the Commission cannot rely upon the 1995 NAB Survey as an indicator of broadcaster response to the CTA.

**D. The Record as a Whole Supports New FCC Action**

In sum, the record in this proceeding fails to substantiate claims of improvements in children's educational and informational programming. The only major "evidence" submitted by the broadcasters are the 1994 and 1995 NAB surveys, which are unreliable indicators of broadcaster compliance with the CTA.<sup>20</sup> In contrast, the studies conducted by Dale Kunkel, Ph.D., Professor of Communications at the University of California, Santa Barbara, found that the amount of programming aired by broadcasters in 1994 had not increased since 1993.<sup>21</sup> Unlike the NAB study, Dr. Kunkel's study is highly reliable because Dr. Kunkel reviewed license renewal applications of broadcasters filed with the FCC, rather than relying, as NAB did, on broadcaster solicited anonymous self-reports. In addition, Dr. Kunkel studied a randomly selected sample of stations that was representative of the overall broadcast industry. He did not need a station's cooperation or consent to study their performance, while NAB received surveys back from only stations

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<sup>20</sup> Although the Association of Independent Television Stations Inc. ("INTV") and Fox submitted data in this proceeding, Commenters believe these surveys are not indicative of overall broadcaster compliance with the CTA.

<sup>21</sup> See Kunkel & Goette at 1.



that agreed to cooperate. Finally, Dr. Kunkel provided a comprehensive list of every program claimed by every station studied.<sup>22</sup> NAB, in contrast, provided no information about the programs counted as educational. Therefore, NAB's totals are likely to include programs not legitimately considered educational.

Not only does the new evidence show little increase in children's educational programming, but a new study provides further evidence that without action by the Commission, the marketplace will not on its own work to provide more educational programming on commercial broadcast stations. A study conducted for PBS confirms that educational and informational television is less profitable than other types of programming.<sup>23</sup> Thus, without a specific regulatory requirement, stations have a strong economic incentive to air the smallest amount of educational children's programming they can. The FCC can counteract this trend by adopting a quantitative programming standard, a stronger definition of educational programming, and measures to improve the public's and FCC's ability to monitor broadcaster compliance with the CTA.

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<sup>22</sup> If anything, Dr. Kunkel's surveys likely overstated broadcaster compliance with the Act as he included all shows claimed by broadcasters on their license renewal applications as in compliance with the Act.

<sup>23</sup> See PBS Comments, Exhibit B, Jim Trautman & Mark Wyche, Bortz & Co., "Analysis of Commercial Opportunity Costs Associated with Educational Children's Programming" (Oct. 16, 1995).

## II. THE COMMISSION HAS THE AUTHORITY TO ADOPT QUANTITATIVE STANDARDS

NAB has incorrectly interpreted the intent of Congress in passing the CTA as forbidding the adoption of quantitative programming standards.<sup>24</sup> In fact, the floor remarks cited by NAB demonstrate Congress' intent to give flexibility in administering the statute, and not to close the door to a future adoption of rules. Citing Congressman Markey and Senator Inouye, NAB suggests "the legislation does not require the FCC to set quantitative guidelines for educational programming."<sup>25</sup> The NAB fails to recognize, however, that this language does not prohibit the FCC from adopting standards.<sup>26</sup> As Senator Inouye stated, if licensees "cannot be required" to do things for children then "we have given away free a precious resource on a wholly unenforceable basis."<sup>27</sup> (emphasis added). Clearly Senator Inouye was expressing his belief that the FCC had the authority to do what was necessary to achieve the purpose of the Act. Moreover, Congressman Markey recently clarified that, "There is

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<sup>24</sup> See NAB Comments at 11 (Claiming that "Congress intended no quantification of this programming standard"). See Also NBC Comments at 23, Westinghouse Comments at 7-8, and CBS Comments at 13. For extensive argument as to why quantitative standards are necessary, see Comments of CME et. al. at 1-9 (Oct. 16, 1995) ("1995 Comments of CME et. al.").

NAB Comments at 11.

<sup>26</sup> ABC agrees that the Congressional reports show that Congress did not expressly preclude the adoption of numerical standards. See ABC Comments at 31.

<sup>27</sup> 136 Cong. Rec. 10121 (daily ed. July 19, 1990) (statement of Sen. Inouye).

no bar, in the legislative history or elsewhere, to specifying that each licensee meet a minimum quantified standard or guideline." <sup>28</sup>

The correct interpretation of Congressional intent is that quantitative standards are neither required nor precluded.<sup>29</sup> While the FCC has previously interpreted the legislation as expressing a "preference" for avoiding quantitative standards at that time,<sup>30</sup> this hardly carries the preclusion of later adoption as NAB currently insists.<sup>31</sup> Congress clearly intended the Act to increase the amount of educational and informational

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<sup>28</sup> Reply Comments of Rep. Edward J. Markey, MM Docket No. 93-48 at 1 (Nov. 14, 1995) ("Markey Reply").

<sup>29</sup> Markey Reply at 1. Smolla further argues that explicit Congressional authorization of agency action is required when agency action deprives one of liberty, or implicates serious First Amendment concerns. Smolla at 29-30; 32-33. However, requiring broadcasters to air three hours of children's programming does not implicate serious First Amendment concerns, or deprive licensees of a liberty interest, therefore it does not require explicit Congressional authorization. Cf. Kent v. Dulles, 357 U.S. 116, 125, 129-30 (1958) (there the court held the agency's denial of passports to people deemed to be Communists, effectively denied them of their constitutionally protected liberty interest in the right to travel without due process of law); Hampton v. Mow Sun Wong, 426 U.S. 88, 90, 102-03, 116-17 (1976) (where agency action barred noncitizens from employment in federal civil service jobs, the Court held that such a condition of eligibility effectively denied these individuals of an interest in liberty without due process of law).

<sup>30</sup> Notice of Inquiry, 8 FCC Rcd 1841, at ¶ 5 (Mar. 2, 1993) ("Notice").

<sup>31</sup> Moreover, the FCC's explicit recognition of the efficacy of quantitative standards to prevent excessive advertising to children suggests that the adoption of similar standards with regard to the scope of broadcasters' educational programming obligations would be beneficial to broadcasters Id. at ¶ 7.

programming available to children on broadcast stations,<sup>32</sup> and the CTA grants the Commission broad discretion to do what is necessary to achieve this result.

### **III. THE FCC'S ADOPTION OF PROGRAMMING STANDARDS AND A STRENGTHENED DEFINITION OF EDUCATIONAL AND INFORMATIONAL PROGRAMMING IS CONSTITUTIONAL**

As CME et al. stated in their original Comments, adoption of programming standards and a strengthened definition of what constitutes educational programming<sup>33</sup> is consistent with the First Amendment, as it reasonably balances broadcaster's right to speak with children's right to receive educational programming. In this Section, Commenters respond to the Statement Professor Rodney Smolla's ("Statement") and attached to the NAB's comments claiming that the imposition of guidelines or standards violates the First Amendment. Commenters focus on Smolla's statement because other Commenters either did not address this issue, or made arguments similar to Smolla's.

#### **A. Traditional First Amendment Jurisprudence Principles Are Inapplicable To Broadcasting Which Has Its Own Unique Regulatory Tradition Because Of Spectrum Scarcity**

Although Smolla acknowledges that Red Lion presents the correct standard to review the FCC's proposals,<sup>34</sup> his

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<sup>32</sup> 9 See e.g. Senate Report at 22-23 and House Report at 17.

<sup>33</sup> The FCC's programming standard and strengthened definition of educational programming will collectively be referred to hereinafter as "FCC proposals."

<sup>34</sup> Smolla at 7 fn. 5 ("The argument advanced in this Statement, assumes, however, that Red Lion remains the governing standard.").

conclusions are premised on the principle that broadcasters should be treated like all other speakers under the First Amendment.<sup>35</sup> While commenters agree the "independence and autonomy of speakers . . . to decide for themselves what to say and what not to say is a universal theme in First Amendment jurisprudence,"<sup>36</sup> this principle has been significantly limited in broadcasting jurisprudence. The Supreme Court has repeatedly recognized that broadcasting's regulatory framework is unique due

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<sup>35</sup> For example, Smolla several times cites language from Turner Broadcasting System, Inc. v FCC, 114 S.Ct. 2445 (1994), to support the notion that all speakers, including broadcasters, realize limitless autonomy. Smolla at 4, citing Turner Broadcasting, 114 S.Ct. 2445, 2458 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence."); Smolla at 21, citing Turner 114 S.Ct. at 2458, quoting Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987) ("For the Commission to impose qualitative and quantitative content-based obligations on only one medium of expression is in serious tension with the First Amendment principle that 'laws that single out the press, or certain elements thereof, for special treatment, 'pose a particular danger of abuse by the state.'"). Smolla's support for these statements all derive from traditional First Amendment case law including commercial, cable, political and free speech cases, cases that do not recognize the unique tradition of regulation in broadcasting.

Smolla's reliance on Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S.Ct. 2338 (1995) is similarly misfounded because Hurley was a "free speech" case regarding private citizens First Amendment right to exclude certain speakers/marchers, whose message they did not agree with, from a city sponsored parade. Smolla at 16. Like the other cases Smolla cites, this case's interpretation of traditional First Amendment jurisprudence has limited bearing on broadcast jurisprudence.

<sup>36</sup> Smolla at 15.

to spectrum scarcity,<sup>37</sup> and as a result, the autonomy principle has limited application. As the Supreme Court recently reaffirmed in Turner,

[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.<sup>38</sup>

Thus, broadcast jurisprudence, unlike traditional First Amendment jurisprudence, has historically recognized the FCC's authority to impose affirmative content obligations on licensees in the public interest that could not be imposed on other media.

1. **Turner does not proscribe the FCC's authority to impose content requirements on broadcasters**

Smolla also contends that the recent Supreme Court decision in Turner limited the FCC's authority to impose content restrictions on broadcasters.<sup>39</sup> Smolla quotes two passages from Turner to support this proposition. The passages discuss generally the FCC's programming requirements.<sup>40</sup> The sole purpose of this discussion was to make the very narrow point that the 1992 Cable Act's must carry provisions, which require

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<sup>37</sup> Smolla suggests that the FCC relies on a market dysfunction theory as support for the FCC's current proposed regulations. Smolla at 4. However, spectrum scarcity, and not market dysfunction, underlie the Commission's broadcast jurisprudence and underpin the FCC's current proposals. Surely, the fact that there is market dysfunction in a scarce broadcast environment exacerbates the problem.

<sup>38</sup> Turner, 114 S.Ct., at 2457, citing Red Lion, 395 U.S. at 388. See also CBS v. DNC, 412 U.S. 94, 101 (1973).

<sup>39</sup> Smolla at 11-12.

<sup>40</sup> Smolla at 12-13.

cable systems to carry broadcast signals, were not content-based.<sup>41</sup> The first passage cited states:

In particular, the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although "the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear."<sup>42</sup>

Smolla's assertion that this language proves the imposition of programming requirements are prohibited is incorrect. Rather the passage which suggests the FCC may not impose its private notions on the public, quoted from the Network Programming Inquiry, Report and Statement of Policy, when read in context, merely means that the government should not make program by program judgments of what is a good and bad show.<sup>43</sup> Nothing in the proposed children television regulations require the FCC to make a judgement as to whether a program is good or bad, or to impose

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<sup>41</sup> Justice Kennedy was rebutting the dissenters contention that the must carry provisions were "content-based," therefore, it was necessary for him to characterize the restrictions imposed on broadcasting as narrowly as possible. Turner, 114 S.Ct. at 1462-64.

<sup>42</sup> Smolla at 12, quoting Turner, 114 S.Ct. at 2463, quoting in part Network Programming Inquiry, Report and Statement of Policy, 25 Fed. Reg. 7293 (1960).

<sup>43</sup> Network Programming Inquiry, Report and Statement of Policy, 25 Fed. Reg. 7293 (1960), quoting Chairman of the Commission at Hearings before the Subcommittee of the Committee on Appropriations, 86th Cong., 2d Sess., on H.R. 11776 at 775 ("I don't see how we could possibly go out and say this program is good and that program is bad). The same policy statement later recognized that a "majority of station owners recognize the burden of service and gladly assume it." Id. at 7294. This demonstrates that broadcasters recognize the FCC's authority to fashion broadcaster service to the public, including the adoption of affirmative programming requirements.

the FCC's private notions on broadcasters. Rather, the FCC is implementing the Congressional judgement that increased educational programming for children is widely desired and in the public's best interest. Smolla similarly stretches a second provision from Turner to suggest that the FCC can not prescribe particular content in stating,

What is important for present purposes, however, is that noncommercial licensees are not required by statute or regulation to carry any specific quantity of 'educational' programming or any particular 'educational' programs. Noncommercial licensees, like their commercial counterparts, need only adhere to the general requirements that their programming serve 'the public interest, convenience or necessity.'<sup>44</sup>

However, again scrutiny of the statement above that licensees "need only adhere to the general requirements that their programming serve the 'public interest, convenience or necessity'" in context reveals that it was made in 1960, prior to the enactment of the CTA, which imposed a more specific requirement on commercial broadcasters to air some programming specifically designed to education and inform children.<sup>45</sup> Moreover that quote was originally found in the En Banc Programming Inquiry which acknowledged the FCC's obligation to provide children's programming and other categories of

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<sup>44</sup> Smolla at 12-13, quoting Turner Broadcasting, 114 S.Ct. at 2463, quoting in part En Banc Programming Inquiry, 44 F.C.C. 2303, 2312 (1960).

<sup>45</sup> 47 U.S.C. § 303(a). Turner readily recognized that the CTA was a permissible affirmative requirement on broadcasters. Turner, 114 S.Ct. at 2462, n.7.



programming in fulfillment of their public interest requirements.<sup>46</sup> In fact, for many years, the Commission used specific quantitative processing guidelines for non-entertainment programming to review broadcasters' license renewal applications and to determine whether or not a licensee fulfilled its public interest requirements.<sup>47</sup> Applications reflecting less than 10 percent of non-entertainment programming required further Commission review.<sup>48</sup> The Commission stopped using these guidelines in the 1980's having determined that marketplace forces would provide sufficient amounts of this programming.<sup>49</sup> However, the children's educational television marketplace has

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<sup>46</sup> En Banc Programming Inquiry, 44 F.C.C. 2303, 2314 (1960) (The major elements usually necessary to meet the public interest . . . have included: (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports).

<sup>47</sup> Amendment of Part 0 of the Commission's Rules-- Commission Organization-- With Respect to Delegations of Authority to the Chief, Broadcast Bureau, 43 FCC2d 638 (1973) (establishing processing guideline stating that commercial television applications proposing less than 10% non-entertainment programming should be sent to the Commission for consideration) later amended in Amendment to Section 0.281 of the Commission's Rules: Delegations of Authority to the Chief, Broadcast Bureau, 59 FCC 2d 491 (1976) (expanding the processing guideline to include that applications proposing less than 5% informational programming, less than 5% total local programming, and less than 10% non-entertainment programming should be sent to the Commission for consideration). Non-entertainment programming included agricultural, instructional, religious and similar broadcasts. Id. at 492. Informational programming included news and public affairs broadcasts. Id.

<sup>48</sup> See Revision of Programming, 98 FCC2d at 1078.

<sup>49</sup> See Revision of Programming, 98 FCC2d 1076, 1080, 1104 (1984); Deregulation of Radio, 98 FCC2d 968, 978 (1981).